Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

RODOSVALDO POZO,

Petitioner,

v.

GARY McCAUGHTRY, RANDALL GERRITSON, and DAVID HAUTAMAKI,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

Whether review of Court of Appeals' decision interpreting the administrative exhaustion requirement codified at 42 U.S.C. § 1997e(a) is warranted, where the Court of Appeals' decision: (a) holds that a state procedural rule that is neither firmly established nor regularly followed can bar a § 1983 complaint; (b) determines that the administrative exhaustion requirement of § 1997e(a) never can be excused, not even if cause and prejudice are shown; and (c) conflicts with the decision of at least one other Court of Appeals by concluding that a state rule governing the timeliness of an administrative filing can bar a federal complaint, even if state officials have virtually limitless discretion to waive that rule.

PARTIES TO THE PROCEEDINGS BELOW

The following individuals were parties to the proceedings in the Court of Appeals:

Rodosvaldo Pozo
Gary McCaughtry
Randall Gerritson
David Hautamaki

CORPORATE DISCLOSURE STATEMENT

Because Petitioner is an individual, there are no corporate disclosures to be made pursuant to Rule 29.6.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Rodosvaldo Pozo petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit reversing the District Court's denial of Respondents' motion to dismiss Petitioner's § 1983 complaint (Pet. App. 1a-6a) is reported at 286 F.3d 1022. The District Court's decision denying Respondents' motion to dismiss (Pet. App. 7a-26a) is not reported.

JURISDICTION

The judgment of the Seventh Circuit was entered on April 18, 2002. (Pet. App. 1a-6a.) A timely petition for rehearing and rehearing en banc was denied on May 13, 2002. (Pet. App. 43a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE AND REGULATIONS INVOLVED

42 U.S.C. § 1997e(a) provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Wis. Admin. Code § DOC 310.13(1) provides:

> A complainant dissatisfied with a decision [with respect to a Department of Corrections decision concerning an inmate's grievance] may, within 10 calendar days after the date of the decision, appeal that decision by filing a written request for review with the corrections complaint examiner on forms supplied for that purpose. The institution shall provide a supply of appeal forms and make the forms readily available to inmates.

Wisc. Admin. Code § DOC 310.13(3) provides:

> The CCE [corrections complaint examiner] may accept for review an appeal filed later than 5 calendar days after receipt of the decision if the elapsed time has not made it difficult or impossible to investigate the complaint.

STATEMENT OF THE CASE

This petition seeks review of the Seventh Circuit's decision reversing the District Court's denial of Respondents' motion to dismiss the 42 U.S.C. § 1983 complaint filed by Petitioner Rodosvaldo Pozo ("Pozo"), in which the Seventh Circuit held that Pozo failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) because he "did not file a timely appeal" from the rejection by Wisconsin state officials of his administrative complaints. (Pet. App. 6a.) The Seventh Circuit so held even though Pozo *did* file administrative appeals, albeit outside the 10-day time limit in which Pozo could have had his appeals considered as a matter of right, and even though Wisconsin law conferred on state officials *virtually unlimited discretion* to entertain Pozo's appeals regardless of when he filed them. Pozo had argued that the broad and essentially standardless discretion possessed by state authorities to consider untimely appeals rendered Wisconsin's time requirements for filing appeals insufficient to supply an adequate and independent state ground of decision. The Seventh Circuit disagreed, finding that "[i]f the existence of this [discretionary] power means that prisoners need not file timely complaints and appeals, then the incentive that § 1997e(a) provides for prisoners to use the state process will disappear." (Pet. App. 4a.)

The Seventh Circuit's decision adopts a strikingly harsh approach to the exhaustion requirement that conflicts with the decisions of this Court and the decision of at least one other Court of Appeals. Indeed, the Seventh Circuit's decision — despite purporting to apply general rules of exhaustion applicable in habeas cases to § 1997e(a)'s administrative exhaustion requirement (Pet. App. 4a-5a) — erects barriers to

a § 1983 action that are considerably more formidable than the existing barriers to a federal habeas attack on a state court judgment. For example, it is well-settled that a state procedural rule cannot bar a habeas action unless the rule has been "firmly established and regularly followed." *See, e.g., Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The Seventh Circuit's decision, however, recognizes no such requirement for purposes of administrative exhaustion. Another example: in habeas cases, it is well-settled that a petitioner's procedural default is excused upon a showing of cause and prejudice. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The Seventh Circuit, however, refused to recognize even this limited exception for purposes of administrative exhaustion. Instead, the Seventh Circuit concluded that Pozo's failure to file his administrative appeal in a timely manner compelled the conclusion that "his federal suit must be dismissed" (Pet. App. 6a), even though the District Court never had a chance to consider whether there was reason to excuse Pozo's purported tardiness in filing his administrative appeals.

The Seventh Circuit's unprecedented decision — which purports to apply general principles set forth in this Court's habeas exhaustion jurisprudence in the context of administrative exhaustion, but which disregards those principles in material respects, with the result being an administrative exhaustion requirement that is far more strict than the habeas exhaustion requirement — addresses important issues that arise with great frequency in § 1983 litigation. Indeed, the decision already has been cited repeatedly, and also has been used as a springboard for further purported "innovations" in the law of administrative exhaustion. *See Strong v. David*, ___ F.3d ___, 2002 WL 1610797 at *3 (7th Cir. July 23, 2002) (adding "the logical extension" to *Pozo*

ruling that administrative exhaustion requires that grievances must be made in accordance with the pleading rules (such as fact-pleading or code-pleading rules) adopted by the particular state involved); *see also Dixon v. Page*, 291 F.3d 485, 491 (7th Cir. 2002) (citing *Pozo* with approval); *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002) (same); *Moffat v. Broyles*, 288 F.3d 978, 982 (7th Cir. 2002) (same). Absent correction, the Seventh Circuit's interpretation of § 1997e(a)'s administrative exhaustion requirement will impose a manifestly improper burden on § 1983 claimants in ever-increasing numbers, as more federal courts rely on the Seventh Circuit's approach.

A. The Parties And Pozo's Federal Claims.

Petitioner Rodosvaldo Pozo is a state prisoner who presently is confined at the Supermax Correctional Institution in Boscobel, Wisconsin, and who previously was confined at the Waupun Correctional Institution in Waupun, Wisconsin. (R.1; R. 7.) Respondents Gary McCaughtry, Randall Gerritson, and David Hautamaki are staff members at Waupun. (R. 1.)

Pozo filed a civil rights action under 42 U.S.C. § 1983 alleging numerous claims against prison personnel, but as a result of the District Court's adjudication of Respondents' motion to dismiss, only two claims remained at the time of the Seventh Circuit's decision: (1) Pozo's legal mail was taken and opened, in violation of the First Amendment (Pet. App. 18a-21a); and (2) Pozo was denied indoor and outdoor exercise for a period of six months, in violation of the Eighth Amendment (Pet. App. 17a-18a). In denying Respondents' motion to dismiss these claims, the District Court rejected Respondents' argument that Pozo had failed to exhaust his administrative remedies before filing his § 1983 action (Pet. App. 10a-19a),

and the District Court thereafter denied Respondents' motion for reconsideration on the exhaustion issue. (Pet. App. 27a-34a.)

B. The Available Administrative Remedies.

The administrative remedies that were available to Pozo are set forth in the Inmate Complaint Review System ("ICRS") in Wisconsin's Administrative Code. *See* Wis. Admin. Code § DOC 310.01(2)(a), (h). In a section entitled "[e]xhaustion of administrative remedies," the ICRS provides (*id.* § 310.04) that inmates may commence a civil action against prison personnel after they have submitted their claims pursuant to the following two-step review process.

First, inmates file a complaint with the Inmate Complaint Examiner. *See id.* § 310.09. Inmates must do so "within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may accept a late complaint for good cause." *Id.* § 310.09(3). After evaluating the complaint, the Institution Complaint Examiner delivers a written recommendation along with the complaint file to the Warden for decision. *Id.* §§ 310.11, 310.12(1).

Second, if inmates are dissatisfied with the Warden's decision, the next (and last) administrative remedy available to them is an appeal to the Corrections Complaint Examiner. *Id.* § 310.13(1). The prescribed time for filing an appeal is "within 10 calendar days after the date of the decision." *Id.* In addition, however, the ICRS provides in a separate section that the Corrections Complaint Examiner "may accept for review" an appeal *regardless of when it is filed* "if the elapsed time has not made it difficult or impossible to investigate the complaint." *Id.* § 310.13(3). If inmates lose their appeal, then under the ICRS,

they have exhausted their administrative remedies and are free to commence a civil action. *Id.* § 310.04.

C. Pozo's Exhaustion Of His Administrative Remedies.

It is undisputed that Pozo invoked the only two administrative remedies that Wisconsin law afforded. He timely filed his complaints with the Institution Complaint Examiner and he thereafter filed appeals from the Warden's adverse determinations with the Corrections Complaint Examiner. (*See id.*) Granted, Pozo did not appeal the Warden's adverse determinations until more than a year had elapsed since those rulings, but § 310.13(3) vested the Corrections Complaint Examiner with discretion to consider Pozo's appeals anyway, so long as the passage of time had not made it "difficult" or "impossible" to investigate his claims.

The Corrections Complaint Examiner refused to consider Pozo's appeals because they were untimely, but he did *not* find that review was inappropriate because it had become "difficult" or "impossible" to evaluate Pozo's claims. Instead, in his written dispositions of Pozo's appeals, the Corrections Complaint Examiner cited as his sole ground for dismissal Pozo's non-compliance with the 10-day time limit set forth in § 310.13(1). (R. 33.)

D. The District Court's Exhaustion Determination And The Interlocutory Appeal.

After Pozo filed his § 1983 action, Respondents moved to dismiss, arguing among other things that Pozo had failed to exhaust his administrative remedies in accordance with § 1997e(a) because he had not filed his administrative appeals in a timely manner. The District Court rejected Respondents' exhaustion argument in a decision dated May 10, 2001 (Pet.

App. 7a-26a) and denied reconsideration on June 19, 2001 (Pet. App. 27a-34a). The District Court thereafter granted Respondents' motion to certify the May 10, 2001 order for interlocutory appeal under 28 U.S.C. § 1292(b) (Pet. App. 35a-40a), and the Seventh Circuit accepted the appeal (Pet. App. 41a-42a).

E. The Seventh Circuit's Decision.

On April 18, 2002, in a decision authored by Judge Frank Easterbrook, the Seventh Circuit reversed the District Court. (Pet. App. 1a-6a.) After determining that the general exhaustion principles governing habeas cases also apply to § 1997e(a)'s exhaustion requirement, and that "a prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies" (Pet. App. 3a), the Seventh Circuit concluded that Pozo had failed to exhaust because he did not file his administrative appeals within the 10 days prescribed by § 310.13(1) of Wisconsin's Administrative Code (Pet. App. 3a-4a). In so holding, the Seventh Circuit rejected Pozo's argument that because § 310.13(3) granted state officials virtually limitless discretion to consider late appeals, Wisconsin's timeliness "rule" was not sufficiently firm and regular to bar Pozo's federal complaint (Pet. App. 4a):

> [T]his position would leave § 1997e(a) without any oomph. Wisconsin cannot be unusual in allowing prison officials some authority to entertain untimely complaints and appeals. If the existence of this power means that prisoners need not file timely complaints and appeals, then the incentive that § 1997e(a) provides for prisoners who use the state process will disappear. Prisons are unlikely to entertain many appeals filed a year late, or by prisoners

> who otherwise thumb their noses at the specified procedures.

Although Pozo's appeals *could* have been considered by state officials, because Pozo's appeals were not filed within the 10-day time period in which they would have been heard as a matter of right, the Seventh Circuit held that Pozo's federal lawsuit "must be dismissed" (Pet. App. 5a-6a):

> To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require. Pozo filed a timely and sufficient complaint but did not file a timely appeal. He therefore failed to exhaust his administrative remedies, and his federal suit must be dismissed.

Following the Seventh Circuit's decision, Pozo timely filed a petition for rehearing and for rehearing en banc. The Seventh Circuit denied that petition on May 13, 2002. (Pet. App. 43a.)

REASONS FOR GRANTING THE WRIT

In holding that Pozo's § 1983 claim must be dismissed due to his purported failure to comply with the administrative exhaustion requirement — despite the absence of any rule barring state officials from considering Pozo's grievances, and despite the fact that Pozo had no opportunity to show cause and prejudice for his alleged procedural default — the Seventh Circuit's decision has resolved important and recurring questions of federal law in a way that conflicts with this Court's prior decisions and contradicts bedrock principles concerning the nature and scope of the exhaustion requirement. Review by this Court is warranted for the following reasons:

1. The Seventh Circuit's decision conflicts with the long line of decisions of this Court holding that to be an adequate ground of decision, the state's procedural rule must be both "firmly established and regularly followed." *See, e.g., Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). No established and regularly followed rule barred consideration of Pozo's administrative appeals. To the contrary, Wisconsin law affords state officials broad discretion to consider administrative appeals *at any time*, and supplies no guidelines and virtually no limits concerning how that discretion should be exercised. The presence of that broad and standardless discretion should have deprived Wisconsin's timeliness "rule" of the certainty and regularity that is necessary for that rule to bar federal claims, but the Seventh Circuit refused to so hold, stating that such a determination "would leave [the exhaustion requirement of] § 1997e(a) without any oomph." (Pet. App. 4a.) The Seventh Circuit cited no authority in support of this statement, which contradicts the decisions of this Court holding that a state procedural rule can bar a federal complaint only if it is firmly established and regularly followed. Review is warranted to correct the Seventh Circuit's overbroad interpretation of the § 1997e(a)'s exhaustion requirement.

2. Review is warranted because the Seventh Circuit's decision contradicts this Court's prior decisions holding that a petitioner's procedural default is excused upon a showing of cause and prejudice or to prevent a fundamental miscarriage of justice. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Disregarding this important exception to the exhaustion requirement, the Seventh Circuit held that Pozo's failure to file his administrative appeals in a timely manner required that his "federal suit must be dismissed" (Pet. App. 6a), even though the District Court never had the opportunity to consider

whether cause and prejudice existed to excuse Pozo's supposedly late administrative filings. Review is warranted to confirm that, notwithstanding the Seventh Circuit's cavalier disregard of this core principle of fairness long recognized in this Court's exhaustion jurisprudence, a petitioner should be allowed to avoid a finding of procedural default by showing cause and prejudice.

3. Review is warranted because the Seventh Circuit's decision conflicts with the Ninth Circuit's decision in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). *Morales* held that a state procedural rule governing the timeliness of habeas pleadings could not preclude a federal complaint because state officials possessed considerable discretion to enforce or waive the time requirements and had not invoked them consistently. In stark contrast to *Morales*, the Seventh Circuit held that the state time requirements for filing administrative appeals barred Pozo's federal complaint, even though Wisconsin law issues a virtual blank check to state officials to waive those requirements and to consider appeals at any time. Review is warranted to address the Circuit split on an important and recurring question of federal law that the Seventh Circuit's decision has created.

I. Review Is Warranted Because The Seventh Circuit's Decision Conflicts With The Decisions Of This Court Holding That A State Procedural Rule Cannot Bar A Federal Complaint Unless It Is Firmly Established And Regularly Followed.

Review is warranted because the Seventh Circuit's decision contradicts the long line of habeas exhaustion decisions holding that a state procedural rule must be both "firmly established and regularly followed" before it can bar a

federal complaint. *See Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 885 (2002); *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *James v. Kentucky*, 466 U.S. 341, 348 (1984).

No regularly followed rule barred consideration of Pozo's administrative appeals. The 10-day time limit set forth in § 310.13(1) of Wisconsin's Administrative Code certainly posed no impediment, jurisdictional or otherwise, to consideration of Pozo's appeal. To the contrary, § 310.13(3) gave the Corrections Complaint Examiner the discretion to consider an appeal *at any time*, and imposed no conditions or limitations on the grant of that review. In effect, § 310.13(3) afforded the Corrections Complaint Examiner absolute discretion to accept or reject late appeals as the Examiner pleased — subject only to the limitation that the elapsed time must not have made it "difficult or impossible to investigate the complaint."

There is *no* evidence that Pozo's claims had become "difficult" or "impossible" to assess when the Corrections Complaint Examiner rejected Pozo's appeals — indeed, the written dispositions of the appeals cited *only* the passage of the 10-day time limit set forth in § 310.13(1), not any practical barriers to further review. (R. 33.) So what we are left with is a state official's invocation of a timeliness requirement that the official was free to apply or ignore at whim. Under the cases just cited, the enforcement of such an amorphous "rule" cannot bar a federal complaint.

In its decision, the Seventh Circuit did not cite any of the above cases holding that a state procedural rule must be firmly established and regularly followed before it can supply an adequate ground of decision, or attempt to reconcile its sweeping interpretation of the administrative exhaustion

requirement with that settled principle. Instead, the Seventh Circuit appears to have been motivated by the concern that declaring Wisconsin's timeliness requirements for administrative appeals too open-ended to supply an adequate ground for decision would render § 1997e(a)'s exhaustion requirement toothless. *See* Pet. App. 4a (expressing concern that such a disposition "would leave § 1997e(a) without any oomph"). Two simple solutions to the concern expressed by the Seventh Circuit, however, would be either (1) for Wisconsin legislators to adopt timeliness rules that are more certain in their application, if Wisconsin desires to take advantage of § 1997e(a)'s exhaustion requirement; or (2) for Wisconsin prison officials refusing to hear appeals to find explicitly that § 310.13(3) cannot be invoked to allow a late appeal because the passage of time has rendered it "difficult" or "impossible" to consider the inmate's grievance. But irrespective of the plight facing Wisconsin state officials, the Seventh Circuit should have applied settled federal exhaustion law to this appeal, rather than sidestep that law to avoid a result that is merely the logical consequence of Wisconsin having adopted an administrative appeal system that lacks limits or standards.

The bitter irony of the decision below is that the Seventh Circuit, although purporting to apply general rules concerning habeas exhaustion to § 1997e(a)'s administrative exhaustion requirement (Pet. App. 2a-3a), actually has made the administrative exhaustion requirement considerably more difficult to satisfy than the habeas exhaustion requirement. That result is ironic because, if anything, it is the habeas exhaustion requirement that logically should be the stricter of the two exhaustion rules. Because a federal habeas petition is a collateral attack on a completed course of state court adjudications, in which the federal court reviews whether the

state proceedings were correct, considerations of federalism and comity clearly dictate a stringent exhaustion rule to ensure that the petitioner has provided the state judicial system with every reasonable opportunity to correct any purported errors before proceeding to federal court.

The § 1983 action, in contrast, is *not* a collateral attack on the judgment of a state court. *Cf. Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 984 (2002) (observing that administrative exhaustion requirement's purpose, instead of promoting comity and federalism, is to promote internal dispute resolutions by corrections officials, which might obviate the need for litigation or filter out frivolous claims). So it is no surprise that exhaustion in the administrative context never has been viewed to be as important as it is in the habeas corpus context — until 1980, no administrative exhaustion requirement was codified *in any form*, and Congress did not even make administrative exhaustion mandatory in every case until 1995. *See* Civil Rights of Institutionalized Persons Act, 94 Stat. 352, as amended, 42 U.S.C. § 1997e (1994 ed.) (enacting discretionary exhaustion requirement); Prison Litigation Reform Act of 1995, 110 Stat. 1321-73, as amended, 42 U.S.C. § 1997e(a) (1994 ed., Supp. V) (enacting mandatory exhaustion requirement).

Given the fundamental differences between habeas exhaustion and administrative exhaustion, in adopting an approach to administrative exhaustion that makes it considerably harder for a § 1983 petitioner to get into federal court than it is for a habeas petitioner, the Seventh Circuit promulgated an approach to exhaustion that is as unprecedented as it is indefensible. At a minimum, a § 1983 petitioner should be entitled to the same safeguards that a habeas petitioner

enjoys under established precedent. Under that precedent, a state procedural rule bars a federal complaint only if the rule is firmly established and regularly followed. Because Wisconsin's timeliness "rule" does not come close to meeting this standard, review by this Court is appropriate to correct the Seventh Circuit's improper interpretation of § 1997e(a)'s exhaustion requirement.

II. Review Is Warranted Because The Seventh Circuit's Decision Conflicts With The Decisions Of This Court Holding That A Petitioner's Procedural Default Is Excused If Cause And Prejudice Are Demonstrated.

Review is warranted because the Seventh Circuit's decision cannot be reconciled with the long line of habeas exhaustion cases holding that a petitioner's procedural default may be excused upon a showing of cause and prejudice. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

The Seventh Circuit, based on this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), concluded that the general rules concerning exhaustion and procedural default should be the same in habeas and administrative exhaustion cases. *See* Pet. App. 3a (*O'Sullivan*'s "holding merges the collateral-attack and administrative-law understandings of exhaustion [so] [a]fter *Boerckel*, a procedural default also means failure to exhaust one's remedies"). But in its zeal to adopt a simple (and exceedingly draconian) approach to administrative exhaustion, the Seventh Circuit refused to recognize the cause and prejudice exception to procedural default articulated in the prior decisions of this Court. Instead, the Seventh Circuit concluded that Pozo's failure to file his administrative appeal in a timely manner compelled the

conclusion that "his federal suit must be dismissed." (Pet. App. 6a.) The Seventh Circuit so held even though the District Court, having denied Respondents' motion to dismiss, obviously never considered whether there was cause and prejudice sufficient to excuse Pozo's purportedly late administrative appeals.

The Seventh Circuit's determination to eliminate the cause and prejudice exception to procedural default is unexplained, unprecedented, and directly contrary to the very habeas exhaustion principles that the Seventh Circuit purported to be applying. Review of the Seventh Circuit's decision is warranted to confirm that, contrary to that decision, § 1997e(a)'s exhaustion requirement most certainly is not more stringent than the exhaustion requirement applicable to habeas cases.

III. Review Is Warranted To Address The Circuit Split Created By The Seventh Circuit's Holding That A State Procedural Rule Concerning The Time For Filing Administrative Appeals Can Supply Adequate Ground Of Decision Even If State Officials Enjoy Virtually Unlimited Discretion To Waive The Rule.

Review is warranted because the Seventh Circuit's decision conflicts with the Ninth Circuit's decision in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). At issue in *Morales* was whether California state rules concerning the time for filing habeas petitions, which the California Supreme Court had invoked in denying Morales' first habeas petition, supplied an adequate state ground for the dismissal of Morales' petition. *Id.* at 1389. The California rules under review contained set time limits for filing habeas petitions, but as the Ninth Circuit observed, the rules did not articulate "an unambiguous rule on

timeliness" for petitions filed after the expiration of those time limits. *Id.* at 1390. Another problem with the California system was that "because the California Supreme Court does not provide reasons for its denials of petitions of habeas corpus on timeliness grounds, it is equally difficult to discern what criteria a state court applies when ruling on the timeliness of a petition filed beyond" the time limits prescribed in the rules. *Id.* Finding that there was considerable "variation in [the] application of California's timeliness requirements," and unable to discern a "clear rule" applicable to petitions filed outside prescribed time limits (*id.* at 1391), the Ninth Circuit held that "California's rule on timeliness was not 'clear, consistently applied, and well-established' at any time after Morales's convictions were affirmed and before he filed his first state habeas petition. It consequently cannot serve as an adequate and independent state ground sufficient to support a procedural default." *Id.* at 1393 (citations omitted).

The Seventh Circuit's decision cannot be reconciled with *Morales*. Like the California system found wanting in *Morales*, Wisconsin's administrative rules prescribe (in § 310.13(1)) a set time in which to file appeals, but the rules then deprive (in § 310.13(3)) the system of the required clarity and certainty by endowing state officials with open-ended discretion to consider late appeals. By holding that Wisconsin's system was sufficient to bar Pozo's federal complaint, the Seventh Circuit reached a result that contradicts *Morales*, as well as established exhaustion principles. *See also Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994) (a state procedural rule that is discretionary and not applied consistently "cannot act as a bar to federal review"); *Coleman v. Thompson*, 501 U.S. 722, 758 (1991) (White, J., concurring) (if it were true that "on occasion the Virginia Supreme Court waives the untimeliness rule," then

"the rule would not be an adequate and independent state ground barring direct or habeas review"). Review is warranted to address the Circuit split created by the Seventh Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 2002

APPENDICES

APPENDIX A

In The
United States Court of Appeals
for the Seventh Circuit

No. 01-3623

RODOSVALDO POZO,

Plaintiff-Appellee,

v.

GARY MCCAUGHTRY,
RANDALL GERRITSON,
and DAVID HAUTAMAKI,

Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 99-C-1464—**Aaron E. Goodstein**, *Magistrate Judge.*

ARGUED APRIL 8, 2002—DECIDED APRIL 18, 2002

Before BAUER, EASTERBROOK, and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* This interlocutory appeal, by permission under 28 U.S.C. §1292(b), presents a single question: Whether a prisoner's neglect to take a timely administrative appeal within the state system means that he has

failed to exhaust state remedies for purposes of 42 U.S.C. §1997e(a). The district court, acting through a magistrate judge following consent under 28 U.S.C. §636(c), answered "no." The magistrate judge reasoned that a prisoner exhausts his state remedies by taking all steps that the state requires, whether or not the prisoner complies with the state's rules for form and timeliness of action. We reach the opposite conclusion: unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to "exhaust" state remedies by spurning them, which would defeat the statutory objective of requiring the prisoner to give the prison administration an opportunity to fix the problem—or to reduce the damages and perhaps to shed light on factual disputes that may arise in litigation even if the prison's solution does not fully satisfy the prisoner. See *Porter v. Nussle*, 122 S. Ct. 983 (2002); *Booth v. Churner*, 532 U.S. 731 (2001).

McCoy v. Gilbert, 270 F.3d 503, 508 (7th Cir. 2001), foreshadows this conclusion. Now we make it definitive. See also *Marsh v. Jones*, 53 F.3d 707, 710 (5th Cir. 1995); *Harper v. Jenkin*, 179 F.3d 1311 (11th Cir. 1999). The argument on the other side is that "exhaustion" carries two senses. One, from administrative law, is that exhaustion means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits). The other, until recently the norm in the law of collateral attack, is that a prisoner exhausts state judicial remedies by using whatever is available at the moment; if no remedies are left, then the challenge may proceed in federal court. See *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982). The magistrate judge applied to §1997e(a) the old understanding for collateral attacks, rather than the norm for administrative law. We call it the "old" understanding for

collateral attacks because it was jettisoned by *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). The Supreme Court held in *Boerckel* that to "exhaust" state judicial remedies, for purposes of 28 U.S.C. §2254(b)(1), a prisoner must use all available avenues of review. Thus a prisoner who did not ask the state's highest court to grant discretionary review in his case may well have no state remedies left, but his failure to use those the state had offered means that he did not exhaust those remedies. This holding merges the collateral-attack and administrative-law understandings of exhaustion. After *Boerckel*, a procedural default also means failure to exhaust one's remedies.

When we accepted the appeal in this case, we directed the parties to brief the question whether the approach of *Boerckel* applies to exhaustion under §1997e(a). Sensibly, the parties have agreed that it does. Exhaustion under §1997e(a) is administrative only; a prisoner who uses all administrative options that the state offers need not also pursue judicial review in state court; but a prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by §1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under §1983.

Nonetheless, Pozo submits, his failure to file a timely administrative appeal is not conclusive. Pozo filed a proper administrative complaint. He had 10 days to appeal within the state system. Instead he waited a year, and after receiving his appeal the agency dismissed it as untimely. According to Pozo, his eventual appeal "exhausted" administrative remedies because the state *could have* accepted it and addressed the merits under Wis. Admin. Code § DOC 310.13(3). This rule

says that the Corrections Complaint Examiner "may" accept and decide a belated appeal unless the passage of time has made it "difficult or impossible to investigate the complaint." In Pozo's case the Examiner did *not* adjudicate the untimely appeal, but the *power* to do so is enough for exhaustion, Pozo insists. He acknowledges that *Coleman v. Thompson*, 501 U.S. 722, 740-44 (1991), could be read the other way. *Coleman* holds that failure to take a timely appeal within the state system is a procedural default (and thus blocks federal collateral review unless the prisoner can show cause and prejudice) even when the state court has some power to accept untimely appeals. But Pozo treats *Coleman* as limited to situations in which the power to accept an untimely appeal is tightly confined; when the adjudicator has a broad discretionary power, as in Wisconsin, an untimely appeal should be treated as successful exhaustion.

As we said at the outset, this position would leave §1997e(a) without any oomph. Wisconsin cannot be unusual in allowing prison officials some authority to entertain untimely complaints and appeals. If the existence of this power means that prisoners need not file timely complaints and appeals, then the incentive that §1997e(a) provides for prisoners to use the state process will disappear. Prisons are unlikely to entertain many appeals filed a year late, or by prisoners who otherwise thumb their noses at the specified procedures.

To exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim. As *Artuz v. Bennett*, 531 U.S. 4, 9-10 & n.2 (2000), observes, these include time limits. Consider once more the analogy to collateral attack: if a state court accepts a belated filing, and considers it on the merits, that step makes the filing "proper"

for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court. See *Jefferson v. Welborn*, 222 F.3d 286 (7th Cir. 2000). But if the state stands on its time limits and rejects the filing as too late, then state remedies have not been properly invoked. See *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000). Cases look both ways on the question whether a document that is rejected as *both* late and unmeritorious counts as properly filed. Compare *Brooks v. Walls*, 279 F.3d 518 (7th Cir. 2002), with *Rice v. Bowen*, 264 F.3d 698 (7th Cir. 2001). But Pozo's application was not dismissed on dual grounds. It was rejected as dilatory, with no other ground given or even hinted at. What is more, discretion to extend the time under § DOC 310.13(3) is not linked to the merits. Cf. *Ake v. Oklahoma*, 470 U.S. 68 (1985). That is to say, the Examiner's decision not to entertain Pozo's untimely appeal does not imply any view about the merits of his grievance. So no matter how the Supreme Court resolves the question whether plain-error review or other merits-linked doctrines that may relax procedural rules can relieve a defendant of a default in the state's process, see *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001), cert. granted and question certified under the name *Stewart v. Smith*, 122 S. Ct. 1143 (2001), there is no doubt about the right treatment when the one and only ground for rejecting a claim or appeal is untimeliness. An unseasonable claim is a defaulted claim, as *Coleman* holds; and under *Boerckel* a defaulted claim has not been exhausted either.

To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require. Pozo filed a timely and sufficient complaint but

did not file a timely appeal. He therefore failed to exhaust his administrative remedies, and his federal suit must be dismissed.

REVERSED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RODOSVALDO POZO,

Plaintiff,

v. Case No. 99-C-1464

GARY MCCAUGHTRY, CAPTAIN MURASKI, CAPTAIN COKE, SERGEANT GERRITSON, LIEUTENANT MICHAEL L. HOWARD, and LIEUTENANT HAUTAMAKI,

Defendants.

DECISION AND ORDER

The plaintiff, Rodosvaldo Pozo, a prisoner at Green Bay Correctional Institution, filed this pro se civil rights action under 42 U.S.C. § 1983. The plaintiff filed an amended complaint on December 4, 2000. The amended complaint alleged twelve claims. In granting the plaintiff's request to proceed in forma pauperis, United States District Judge Thomas J. Curran determined that the plaintiff failed to exhaust his administrative remedies as to eight of his twelve claims. As to the other four claims, Judge Curran determined that the plaintiff attached exhibits to his complaint satisfying this court's November 15, 2000 order requiring the plaintiff to demonstrate that he exhausted his administrative remedies prior to filing the amended complaint. Judge Curran reserved ruling

on whether the plaintiff actually exhausted his administrative remedies and whether the plaintiff's exhaustion was defective. Judge Curran also determined that three of the plaintiff's four remaining claims stated a claim upon which relief could be granted.

In the claims remaining, the plaintiff alleges that: (1) the defendants denied him exercise for over six months in violation of the United States Constitution; (2) he found glass in his food several times and the defendants knew of such a thing happening before; and (3) Mr. Gerritson opened his legal mail and stole the mail and other legal papers from him.

On February 2, 2001, the defendants filed a motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6). According to the defendants' motion to dismiss, they are properly known as Gary McCaughtry, Bruce Muraski, Thomas Core, Randall Gerritson, Michael Howard, and David Hautamaki. In their motion, the defendants assert that the plaintiff's complaint should be dismissed because: (1) the plaintiff failed to exhaust his administrative remedies before commencing suit as required by 42 U.S.C. § 1997e(a); (2) the plaintiff fails to state a claim for a violation of the Eighth Amendment; (3) the plaintiff fails to state a claim for a violation of due process or access to the court. In the alternative, the defendants assert that they are entitled to qualified immunity and that the plaintiff fails to allege the defendants' direct personal involvement in the alleged violations.

In response, the plaintiff filed a "Motion to Strike and in support of Pozo's Constitutional Claims." The plaintiff contends that the defendants' motion to dismiss should be "dismissed" because the defendants' counsel failed to comply with Local Rule 6.04 (E.D. Wis.). (Now, Civil Local Rule 12.1

(E.D. Wis.).) As will be discussed later, although the defendants presented matters outside the pleadings, those matters fall into narrow exceptions to the rule that a Fed. Rule Civ. Pro. 12(b)(6) motion is limited to the factual allegations of the complaint. Accordingly, if the court considers the matters presented by the defendants, it need not convert the 12(b)(6) motion to a motion for summary judgment. Therefore, the defendants did not need to comply with Civil Local Rule 12.1. Accordingly, the plaintiff's motion to strike the defendants' motion is denied.

The plaintiff also filed a motion for a temporary restraining order pursuant to Fed. Rule Civ. Pro. 65(b). By the motion, the plaintiff seeks to "compel the Supermax Corr. Inst. Warden G. Berge to provide the plaintiff herein after (Pozo) legal supplies which have been denied ever since Pozo received the Judge order for this civil case . . . and to enter an order restraining the Warden Berg's staffs (sic) from throwing my legal mails away." (T.R.O. Fed. Rule Civ. Pro. 65(b) filed December 29, 2000). This court does not have jurisdiction over Warden Berge or his staff. Accordingly, the plaintiff's motion for a temporary restraining order must be denied.

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter arises under federal statutes. Venue is proper under 28 U.S.C. § 1391. The case was assigned according to the random assignment of civil cases pursuant to 28 U.S.C. § 636(b)(1)(B) and General Local Rule 13.03 (E.D. Wis.). The parties have consented to United States magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and General Local Rule 13.05(a) (E.D. Wis.).

MOTION TO DISMISS

A motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) requires the court to decide whether the plaintiff's pleadings actually state a claim upon which relief can be granted. The well-pleaded allegations in the plaintiff's complaint must be taken as true. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1428 (7th Cir. 1996); Janowsky v. United States, 913 F.2d 393, 395 (7th Cir. 1990). Such allegations must be viewed in light most favorable to the plaintiff. Doherty v. City of Chicago, 75 F.3d 318, 322 (7th Cir. 1996); Travel All Over the World, Inc., 73 F.3d at 1428. Moreover, pro se pleadings must be given a liberal construction. Gregory v. Nunn, 895 F.2d 413, 414 (7th Cir. 1990). A pro se complaint should not be dismissed for a failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-6 (1957); Hughes v. Rowe, 449 U.S. 5, 11 (1980); Williams v. Faulkner, 837 F.2d 304, 307 (7th Cir. 1988), aff'd sub nom. Neitzke v. Williams, 490 U.S. 319 (1989). Furthermore, "facts alleged in a brief in opposition to a motion to dismiss . . . as well as factual allegations contained in other court filings of a pro se plaintiff may be considered when evaluating the sufficiency of a complaint so long as they are consistent with the allegations of the complaint." Gutierrez v. Peters, 111 F.3d 1364, 1367 n.2 (7th Cir. 1997).

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The defendants assert that the plaintiff's action must be dismissed under the Prisoner Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 ("PLRA"), for failure to exhaust administrative remedies. Specifically, the defendants

assert that the plaintiff did not properly complete the process for exhaustion of his administrative remedies through the Inmate Complaint Review System ("ICRS"). With regard to the plaintiff's complaint that Mr. Gerritson stole his legal work, the defendants assert that the plaintiff did not appeal the Inmate Complaint Examiner's ("ICE") and the Warden's dismissal of his complaint to the Corrections Complaint Examiner ("CCE"). With regard to the plaintiff's three other complaints, that Mr. Gerritson opened his legal mail from the ACLU, that he found a piece of crystal in his food, and that he was deprived of exercise for six months, the defendants assert that the plaintiff failed to appeal the decisions of the ICE and the Warden in a timely manner and, therefore, the plaintiff's claims were dismissed pursuant to Wis. Admin. Code. § DOC 310.13(1).

In response, the plaintiff asserts that "he did his upmost (sic) to exhaust his administrative remedies but was illegally and conspiratory (sic) prevented by the defendants Sgt. Gerritson et al to pursue his legal claims under the const. of U.S. of America." (Plaintiff's Brief filed February 9, 2001 at 10). To support his assertion, the plaintiff provides a letter dated October 28, 1999, addressed to the DOC Secretary and a letter dated April 14, 1998, addressed to Warden McCaughtry.

The PLRA states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined to any jail prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). A district court must evaluate whether the plaintiff has exhausted administrative remedies as required

by § 1997e(a) before it renders a decision on the merits. Perez v. Wisconsin Dep't Corrections, 182 F.3d 532 536 (7th Cir. 1999).

The ICRS within Wisconsin prisons is the administrative remedy available to inmates with complaints about prison conditions or the actions of prison officials. Wis. Admin. Code § DOC 310.01(2)(a). Covered complaints include civil rights grievances. Wis. Admin. Code § DOC 310.01(2)(h). The Wisconsin Administrative Code specifically provides that in order for an inmate to exhaust his administrative remedies within Wisconsin prisons, he must file a complaint in the ICRS, receive a decision, and appeal the decision until the Secretary of the Department of Corrections has had the opportunity to render a decision. Wis. Admin. Code § DOC 310.04.

To use the ICRS, an inmate must file a complaint with the ICE within 14 days after the occurrence giving rise to the complaint. Wis. Admin. Code § DOC 310.09(3). Complaints submitted later than 14 days after the event may be accepted for good cause. Wis. Admin. Code § DOC 310.09(3). The ICE then investigates the complaint and makes a recommendation to the warden who renders a decision. Wis. Admin. Code §§ DOC 310.11, 310.12, 310.03(3). Within 5 days of receiving the warden's decision, the inmate may appeal an adverse decision to the CCE who investigates and makes a recommendation to the Secretary of the Department of Corrections. Wis. Admin. Code § DOC 310.13. The Secretary of the Department of Corrections may adopt or reject the recommendation. Wis. Admin. Code § DOC 310.14.

In support of their motion to dismiss, the defendants have submitted the affidavits of Pamela Knick, custodian of records at the Waupun Correctional Institution, and John Ray, a CCE,

along with exhibits. Although the defendants brought this motion pursuant to Fed. Rule Civ. Pro. 12(b)(6) and such a motion is limited to the factual allegations of the complaint, the defendants assert that the affidavits and exhibits they submitted fall within two narrow exceptions to this rule. First, defendants assert that documents a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his or her claim citing Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993). Second, the defendants assert that courts are permitted to take juridical notice of matters of public record without converting a Rule 12(b)(6) motion into a motion for summary judgment citing General Electric Capital Corp. v. Lease resolution Corp., 128 F.3d 1074, 1078 (7th Cir. 1997). According to the defendants, the plaintiff pled exhaustion and exhaustion is central to the plaintiff's claim because of the PLRA's exhaustion requirement. The defendants also assert that the ICRS documents are public records of which this court may take judicial notice. Therefore, the defendants assert that attaching proof that the plaintiff failed to exhaust his administrative remedies before filing this suit does not convert this motion to dismiss into a motion for summary judgment.

Before rendering a decision on the merits, this court must determine whether the plaintiff exhausted his administrative remedies. The plaintiff attached to his amended complaint a "Request for Correction Complaint Examiner Review" dated November 9, 1999, listing claims one through nine and "a" through "l". (Amended Complaint Exhs. 99b and 2). The plaintiff did not, however, attach either the CCE's or the Secretary's decision on any of the complaints.

As to the plaintiff's complaint that Mr. Gerritson stole his legal work there is no "matter of public record" showing that it was not appealed for court to take judicial notice of. Furthermore, the plaintiff submitted Exhibit 2 by which it appears at paragraph h that this complaint was appealed. (Amended Complaint, Exh. 2 ¶ h).

With regard to the plaintiff's complaint that Mr. Gerritson opened his legal mail from the ACLU, that he found a piece of crystal in his food, and that he was denied exercise for six months, this court will take judicial notice of the fact that the plaintiff appealed the decisions of the warden to the CCE and the Secretary. See General Electric Capital Corp., 128 F.3d at 1080 (7th Cir. 1997) (recognizing a narrow exception permitting "a district court to take judicial notice of matters of public record without converting a motion for failure to state a claim into a motion for summary judgment"); United States v. Woods, 925 F.2d 1580 (7th Cir. 1991). This court will also take judicial notice of the fact that the plaintiff's appeals were dismissed as untimely.

However, notwithstanding the fact that the plaintiff's appeals were dismissed as untimely, the plaintiff exhausted his administrative remedies. The defendants do not cite, and this court's research failed to reveal any cases from this circuit holding that a plaintiff does not exhaust his administrative remedies if his appeal at any stage of the process is dismissed as untimely. Nothing requires that the administrative decisions be on the merits of the plaintiff's complaints. All that is required is that "such administrative remedies as are available [must be] exhausted." 42 U.S.C. § 1997e(a). Accordingly, the defendants' motion to dismiss based on the ground that the plaintiff failed to exhaust his administrative remedies is denied.

FAILURE TO STATE A CLAIM

The defendants assert that the plaintiff's complaint that he found glass in his food is insufficient to state a claim for a violation of the Eighth Amendment. Specifically, the defendants assert that the plaintiff fails to allege any harm, much less serious harm from the glass particle, or any facts regarding the "deliberate indifference" element of an Eighth Amendment violation.

"Prison inmates have an Eighth Amendment right to be confined under conditions that provide 'adequate food, clothing, shelter, and medical care.'" Estate of Novack ex rel. Turbin v. County of Wood, 226 F.3d 525, 529 (7th Cir. 2000) (quoting Farmer v. Brennan, 511 U.S. 825, 832 (1994). To make a claim for a violation of the Eighth Amendment right to adequate conditions of confinement, a plaintiff must demonstrate: (1) a "sufficiently serious" deprivation and, (2) that officials acted with a "sufficiently culpable state of mind." Wilson v. Seiter, 501 U.S. 298, 299 (1991). The state of mind required is "deliberate indifference" to the risk, which is equated with the mental state required for criminal recklessness:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. 825, 837 (1994); Miller v. Neathery, 52 F.3d 634, 638-39 (7th Cir. 1995).

"To be cruel and unusual punishment, conduct that does not purport to be punishment at all, must involve more than ordinary lack of due care for the prisoner's interest or safety . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." Wilson, 501 U.S. at 299 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)). "Wantonness does not have a fixed meaning, but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." Wilson, 501 U.S. at 302 (quoting Whitley v. Albers, 475 U.S. at 320). The court of appeals for this circuit has stated that "[i]n all cases, the determination as to whether prison conditions constitute cruel and unusual punishment turns on the totality of the conditions of confinement." DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988).

Contrary to the defendants' assertions, a plaintiff need only provide notice of the elements of his claim, not all the facts to support them. See Hrubec v. National Railroad Passenger Corp., 981 F.2d 962, 963 (7th Cir. 1992). The plaintiff alleges that he "found glasses (sic) in [his] food several times and the Warden et al were all aware of that before." (Amended Complaint at 5).

An inmate must be provided with a "healthy, habitable environment." French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (quoting Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980)). A "healthy, habitable environment" "includes providing nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it." Id. (quoting Ramos, 639 F.2d at 570-71. The

plaintiff sufficiently alleges an "objectively serious danger" which poses a "substantial risk of serious harm." See Novack, 226 F.3d at 529. The plaintiff also sufficiently alleges the defendants' "deliberate indifference." See Id.

The plaintiff does not allege, however, that he was injured by the defendants' deliberate indifference to this objectively serious danger. See Bean v. Washington, 1999 WL 759481, *6 (N.D. Ill. 1999) (holding that "the plaintiff's dissatisfaction with the food, without a showing that it does not meet his nutritional needs or has caused him ill health, is not actionable under 42 U.S.C. § 1983). Therefore, even viewing the allegations in the light most favorable to the plaintiff, he fails to state a claim upon which relief can be granted. Accordingly, the defendants' motion to dismiss the plaintiff's claim of glass in his food is granted.

The defendants also assert that the plaintiff's complaint that he was denied outdoor exercise for six months is insufficient to state a Eighth Amendment claim. Specifically, the defendants assert that the plaintiff omits relevant facts such as the dates of the alleged violation and whether he was in segregation during the alleged violation. The defendants also assert that inmates have no absolute constitutional right to exercise.

Although there is no minimum period of out-of-cell time that must be provided to inmates under the Eighth Amendment, a lack of exercise may be cruel and unusual punishment. French, 777 F.2d at 1255. A lack of exercise rises to a constitutional violation "where movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened." Id. The plaintiff alleged that he was "denied exercise (Rec) for over six months." (Amended

Complaint at 5). Viewing the allegations in the light most favorable to the plaintiff, he stated an Eighth Amendment claim. He alleged that he was denied exercise for six months. The fact that he was in segregation is not alleged in the complaint. Therefore, the court cannot make a determination that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Williams v. Faulkner, 837 F.2d at 307. Accordingly, the defendants' motion to dismiss the plaintiff's claim of denial of exercise is denied.

Finally, the defendants assert that the plaintiff failed to state a claim for a violation of procedural due process because he has an adequate post-deprivation state remedy.

The Fourteenth Amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law;" it protects "the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). In analyzing a due process claim, the court must determine whether the person was deprived of a protected interest and, if so, what process was due. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). When the deprivation of a constitutionally protected property interest is caused by a state employee's random and unauthorized act, a procedural due process claim under § 1983 arises only when the state does not provide the plaintiff with an adequate post-deprivation remedy for the loss. Parratt v. Taylor, 451 U.S. 527, 537 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984).

The plaintiff alleges that Mr. Gerritson "opened [his] legal mails and stole them and stole other legal papers from [him]." (Amended Complaint at 5). The plaintiff had a property interest in his legal mails and other legal papers. See Chavers v.

Abrahamson, 803 F. Supp. 1512, 1515 (E.D. Wis. 1992). The plaintiff does not allege that the deprivation was anything other than random and unauthorized. Therefore, if Wisconsin provides an adequate post-deprivation remedy the plaintiff does not have a claim under § 1983. "A state remedy is an inadequate alternative to relief under § 1983 only if it is 'meaningless' or 'nonexistent' and cannot conceivably be said to provide due process. Duenas v. Nagle, 765 F. Supp. 1393, 1400 (W.D. Wis. 1991) (quoting Easter House v. Felder, 910 F.2d 1387, 1406 (7th Cir. 1990). The State has provided the plaintiff adequate post-deprivation remedies in tort, specifically under the replevin statute, Wis. Stat. § 810.14. See Lewis v. Fielder, 188 Wis. 2d 157, 524 N.W.2d 630 (Wis. 1994). "The fact that an injured party 'might not be able to recover under [the state law] the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies.'" Easter House v. Felder 910 F.2d 1387, 1406 (7th Cir. 1990) (quoting Hudson, 468 U.S. at 535).

Accordingly, the plaintiff's claim that Mr. Gerritson stole his legal mail and other legal papers from him fails to state a claim for procedural due process. The court must now determine whether the plaintiff states a claim for a violation of the First Amendment.

It is well settled that prison officials are not permitted to read an inmate's legal mail unless there is sufficient justification for doing so. See Wolff, 418 U.S. at 574-77; Thornburgh v. Abbott, 490 U.S. 401 (1989); Castillo v. Cook County Mail Room Department, 990 F.2d 304 (7th Cir. 1992). The plaintiff, however, does not allege that Mr. Gerritson read his legal mail. Rather, he alleges only that his legal mail was opened and stolen. "The free-speech clause of the First

Amendment applies to communications between an inmate and an outsider . . . and if [a plaintiff] alleges a continuing pattern or repeated occurrences of such conduct he has a valid claim for a First Amendment violation." Zimmerman v. Tribble, 226 F.3d 568, 572 (7th Cir. 2000) (citing Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987); Sizemore v. Williford, 829 F.2d 608, 609 (7th Cir. 1987)). In his affidavit attached to his brief filed February 9, 2001, the plaintiff avers that Mr. Gerritson opened his legal mail more than eight times. Accordingly, the plaintiff has alleged repeated occurrences and states a claim for a First Amendment violation.

It is well established that prisoners are entitled to meaningful access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977). "Meaningful access to the courts is the touchstone," therefore, an inmate must demonstrate that the alleged denial of access hindered his efforts to pursue a legal claim. Lewis v. Casey, 518 U.S. 343, 351 (1996) (quoting Bounds, 430 U.S. at 823). Meaningful access does not mean unlimited access. Hossman v. Spardlin, 812 F.2d 1019, 1021 (7th Cir. 1987). Courts have allowed some restrictions on a prisoner's access to legal resources to accommodate legitimate administrative concerns, such as maintaining security and order, and observing budgetary constraints. See Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986) (no denial of access when restrictions on direct access to library material justified by legitimate security concerns during "lockdown" following a prison uprising).

In his complaint, the plaintiff does not allege that Mr. Gerritson's actions hindered his efforts to pursue a legal claim. The plaintiff does, in his affidavit attached to his brief filed February 9, 2001, aver in a conclusory manner that he was not

allowed "to pursue legally the true course of justice" and that he was denied access to the court in violation of the First, Fifth, Sixth and Fourteenth Amendments. (Plaintiff's February 6, 2001 affidavit, ¶ 4). This conclusory statement alone is not enough to state a claim for a violation of the First Amendment. Under the facts alleged by the plaintiff, a defendant's right to counsel under the Sixth Amendment does not apply. However, the plaintiff states in his brief that he lost "two civil [cases] and one criminal [case] because Sgt. Gerritson was stealing my legal mails and my legal mails were not sent it (sic) out at all but destroyed." Accordingly, the plaintiff states a claim for a First Amendment violation. The defendants' motion to dismiss the plaintiff's First Amendment claim is denied.

QUALIFIED IMMUNITY

Alternatively, the defendants assert that the plaintiff's case should be dismissed because the defendants are entitled to qualified immunity.

The doctrine of qualified immunity provides that:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Baxter v. Vigo County School Corp., 26 F.3d 728, 737 (7th Cir. 1994). The standard requires that the "contours of the right be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). While the very act in question need not have

been held unlawful, the unlawfulness of the official's conduct must have been apparent in light of preexisting law. Id.

Once a defendant raises the qualified immunity defense, the court uses a two-step analysis to determine whether the official is entitled to qualified immunity: 1) whether the alleged conduct sets out a constitutional violation; and 2) whether the constitutional standards were clearly established at the time of the violation. Lanigan v. Village of East Hazel Crest, 110 F.3d 467, 472 (7th Cir. 1997).

As discussed above, the plaintiff states an Eighth Amendment claim resulting from his lack of exercise for six months. The constitutional standards requiring an institution to provide an inmate some type of exercise was clearly established at the time of the violation. Accordingly, the defendants are not entitled to qualified immunity on that claim.

The plaintiff also states a First Amendment claim resulting from Mr. Gerritson opening his legal mail more than eight times. The constitutional standards regarding repeated occurrences of interrupting an inmate's mail were clearly established at the time of the violation. Accordingly, the defendants are not entitled to qualified immunity on that claim.

Finally, the plaintiff states a Sixth Amendment claim resulting from Mr. Gerritson stealing his legal mail. The constitutional standards regarding access to the courts were clearly established at the time of the violation. Accordingly, the defendants are not entitled to qualified immunity on that claim.

PERSONAL INVOLVEMENT

Finally, the defendants assert that the plaintiff's case should be dismissed because he fails to allege the defendants'

direct involvement in the alleged violations. It is only necessary to discuss the defendants' assertions with regard to the claims remaining. Clearly, the plaintiff alleges the direct involvement of Mr. Gerritson in the alleged stealing and opening of his legal mail.

An individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation. Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994); Rascon v. Hardiman, 803 F.2d 269, 273 (7th Cir. 1986). An official is personally involved if: a) he or she participates directly in the constitutional deprivation; b) acts or fails to act with reckless disregard of the plaintiff's constitutional rights; or c) the conduct that deprived the plaintiff of his constitutional rights occurred at the official's direction or with his or her knowledge and consent. Id.; Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982).

As the defendants assert, the plaintiff did not allege that any of the defendants were involved in the decision to deny him exercise. The plaintiff did aver in his affidavit attached to his February 9, 2000 brief that he was deprived of outdoor exercise by Mr. Hautamaki and that Mr. McCaughtry, the warden, Mr. Muraski and Mr. Core were aware of this deprivation. However, the plaintiff does not have a constitutional right to outdoor exercise. See Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988); Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997). Therefore, the plaintiff has failed to sufficiently allege the personal involvement any of the defendants in denying him exercise and that claim must be dismissed.

Accordingly, the plaintiff has failed to allege the personal involvement or acquiescence of Mr. Howard, Mr. Hautamaki,

Mr. McCaughtry, Mr. Muraski or Mr. Core in his remaining claim. Therefore, the plaintiff's case is dismissed as against Mr. Howard, Mr. Hautamaki, Mr. McCaughtry, Mr. Muraski and Mr. Core.

NOW, THEREFORE, IT IS ORDERED that the defendants' motion to dismiss be and hereby is **granted** in part and **denied** in part.

IT IS FURTHER ORDERED that the plaintiff's claim that he found glass in his food and the plaintiff's claim that he was denied exercise for six months are hereby dismissed. The plaintiff may proceed on his claim that Mr. Gerritson opened and stole his legal mail.

IT IS FURTHER ORDERED that the plaintiff's case is dismissed as against Mr. Howard, Mr. Hautamaki, Mr. McCaughtry, Mr. Muraski and Mr. Core.

To expedite a resolution of this case, the court sets forth the following scheduling order.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. **Answer.** The defendant shall answer the complaint within 10 days after notice of the court's action pursuant to Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure.

2. **Discovery.** All requests for discovery shall be served by a date sufficiently early so that all discovery is completed no later than **July 31, 2001**.

   The parties are advised that, pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, defendants may depose the plaintiff and any other witness confined in a prison

upon condition that, at least 14 days before such a deposition, defendants serve all parties with the notice required by the rule.

3. **Dispositive Motions.** Motions to dismiss (Rule 12 of the Federal Rules of Civil Procedure) and motions for summary judgment (Rule 56 of the Federal Rules of Civil Procedure), together with briefs, are to be filed no later than **August 28, 2001**, and in accordance with Civil Local Rule 7.1 and Civil Local Rule 56.2. Copies of Rule 56 and Local Rules 7.1 and 56.2 (E.D. Wis.) are included with this order.

   If a party files a motion for summary judgment, Rule 56 requires a district court to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

   The plaintiff is advised that if a defendant files a motion for summary judgment supported by one or more affidavits or other materials, the plaintiff may not rely upon the allegations of the complaint but must introduce affidavits or other evidence to "set forth specific facts showing that there is a general issue for trial." Fed. R. Civ. P. 56(e).

4. **Compliance with Court Rules and Orders.** The plaintiff is further advised that failure to make a timely submission or otherwise comply with the court orders will result in the dismissal of this action for failure to prosecute.

5. **Service.** Under Fed. R. Civ. P. 5(a), a copy of **every** paper or document filed with the court must be sent to opposing parties.

Dated at Milwaukee, Wisconsin, this 10th day of May, 2001.

/s/ Aaron E. Goodstein
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RODOSVALDO POZO,

Plaintiff,

v. Case No. 99-C-1464

GARY MCCAUGHTRY, CAPTAIN MURASKI, CAPTAIN COKE, SERGEANT GERRITSON, LIEUTENANT MICHAEL L. HOWARD, and LIEUTENANT HAUTAMAKI,

Defendants.

DECISION AND ORDER

The plaintiff, Rodosvaldo Pozo, a prisoner at Green Bay Correctional Institution, filed this pro se civil rights action under 42 U.S.C. § 1983. On May 10, 2001, the court issued a Decision and Order in this case.

The defendants filed a motion for reconsideration or, in the alternative, for clarification of the May 10, 2001 Decision and Order. The defendants ask the court to reconsider its denial of their motion to dismiss based on their argument that the plaintiff failed to exhaust his administrative remedies. In the alternative, the defendant asks the court to clarify whether the court is allowing the plaintiff to proceed on his claim that Mr.

Gerritson opened and stole his legal mail under the First Amendment, the Sixth Amendment or both.

The plaintiff also filed a motion for reconsideration. The plaintiff asks the court to reconsider its decision dismissing the plaintiff's claim that he was denied exercise for over six months in violation of the Eighth Amendment.

The Defendants' Motion to Reconsider or for Clarification

The defendants assert that the plaintiff failed to exhaust his administrative remedies because he untimely filed his administrative appeals. The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997(e) provides that

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

In Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the court determined that exhaustion of administrative remedies is a precondition to suit, not judgment. Accordingly, the court held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed." Id. The court further held that "[t]here is no futility exception to § 1997e(a)." Id. at 537.

The United States Supreme Court recently addressed the word "exhausted" in the statutory context of 42 U.S.C. § 1997(e):

> [T]he word "exhausted" has a decidedly procedural emphasis. It makes sense only in referring to the

> procedural means, not the particular relief ordered. . . . [O]ne "exhausts" processes, not forms of relief.

Booth v. C.O. Churner, 2001 U.S. LEXIS 3982, *14 (May 29, 2001).

The Wisconsin Administrative Code provides that in order for an inmate to exhaust his administrative remedies within Wisconsin prisons, he must file a complaint in the ICRS, receive a decision, and appeal the decision until the Secretary of the Department of Corrections has had the opportunity to render a decision. Wis. Admin. Code § DOC 310.04. In this case, the plaintiff filed a complaint in the ICRS, received a decision and appealed the decision until the Secretary of the Department of Corrections had the opportunity to render a decision. Accordingly, the plaintiff "exhausted" the process.

The defendants assert, however, that the plaintiff did not "exhaust" the process because he failed to timely appeal the decision of the ICE and the Warden and, therefore, the CCE dismissed his appeal as untimely pursuant to Wis. Admin. Code § DOC 310.13(1). It is the defendants' position that an untimely appeal should be treated as a failure to exhaust. According to the defendants, to rule otherwise and permit an untimely appeal as satisfying the exhaustion requirement would vitiate the purpose of § 1997e.

Interestingly, had the plaintiff failed to appeal to decision of the ICE and the Warden, the defendant would have successfully argued that the plaintiff failed to exhaust his administrative remedies. Therefore, the court would have dismissed the plaintiff's case without prejudice. In all likelihood, the court would have also stated that Wis. Admin. Code § 310.13(3) gives the CCE discretion to accept an

untimely filed appeal "if the elapsed time has not made it difficult or impossible to investigate the complaint." The plaintiff then would have appealed the decision of the ICE and the Warden to the CCR and most likely, the plaintiff's appeal would have been dismissed as untimely pursuant to Wis. Admin. Code § DOC 310.13(1). The plaintiff, after appealing to the Secretary of the Department of Corrections, then would have refiled his suit.

Under the alternative scenario, the defendants would have then argued, as they are now, that the plaintiff failed to exhaust his administrative remedies because his appeal was untimely. Of course, such an argument makes the dismissal without prejudice for failure to exhaust pointless. Under either scenario, the fact that the plaintiff filed an untimely administrative appeal, which was denied, should still satisfy the exhaustion requirement. Therefore, the defendants' argument that the plaintiff failed to exhaust his administrative remedies because the CCE dismissed his appeal as untimely is rejected.

The court concludes that the plaintiff "exhausted" the process. The defendants do not cite to any cases from this circuit holding that a plaintiff does not exhaust his administrative remedies if his appeal at any stage of the process is dismissed as untimely. The defendants quote from Perez v. Wisconsin Dept. of Corrections that "§ 1977e would not be worth much if prisoners could evade it," but the Seventh Circuit was not referring to the exhaustion question; it was specifically referring to the type of relief that could be provided administratively. Perez, 182 F.2d at 537. Interestingly, the Perez court did not say that the plaintiff might as well forego exhaustion, because it would now be untimely. As this court stated in its May 10, 2000 Decision and Order: "Nothing

requires that the administrative decisions be on the merits of the plaintiff's complaints. All that is required is that 'such administrative remedies as are available [must be] exhausted.'" 42 U.S.C. § 1997e." Accordingly, the defendants' motion to reconsider is denied.

In clarification, the plaintiff's claim that Mr. Gerritson opened and stole his legal mail is only a First Amendment claim. The May 10, 2001 Decision and Order mistakenly stated, in the second paragraph at page 16, "the plaintiff states a Sixth Amendment claim resulting from Mr. Gerritson stealing his legal mail." It should have read "the plaintiff states a First Amendment claim resulting from Mr. Gerritson stealing his legal mail." This correction will make the second paragraph consistent with the first paragraph on that page in which the court refers to plaintiff's "First Amendment Claim." Prisoners have a constitutional right under the First Amendment, not the Sixth Amendment to meaningful access to the courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972); Cruz v. Beto, 405 U.S. 319, 321 (1972); Bell v. Milwaukee, 746 F.2d 1205, 1262 (7th Cir. 1984).

The Plaintiff's Motion for Reconsideration

The plaintiff asserts that Mr. Hatumaki and Mr. McCaughtry, the warden, were personally involved in denying him exercise for over six months. The plaintiff submitted a new affidavit along with his motion to reconsider. In the affidavit, the plaintiff states "Warden McCaughtry was very aware of this cruel and unusual punishment employed by Lt. Hautamaki were (sic) (they both) denied me for several months 'outside and inside recreation.'" (Affidavit of Rodosvaldo Pozo filed May 24, 2001 ¶ 6).

Given the pro se status of the plaintiff, the plaintiff's affidavit filed in support of his motion for reconsideration supplements his original complaint. The court of appeals for this circuit has stated:

> [F]acts alleged in a brief in opposition to a motion to dismiss (indeed, even facts alleged for the first time on appeal) as well as factual allegations contained in other court filings of a pro se plaintiff may be considered when evaluating the sufficiency of a complaint so long as they are consistent with the allegations of the complaint.

Gutierrez v. Peters, 111 F.3d 1364, 1367 n.2 (7th Cir. 1997). The plaintiff's new factual allegations are consistent with the allegations of the complaint. Moreover, both Mr. Hautamaki and Mr. McCaughtry were served with the complaint and, until this court's May 10, 2000 Decision and Order, were defendants in this case. Therefore, the court will consider the plaintiff's new factual allegations in re-evaluating the sufficiency of the plaintiff's claim that he was denied exercise for more than six months.

In the May 10, 2001 Decision and Order, the court determined that the plaintiff failed to allege the personal involvement of any of the defendants in denying him exercise (both indoor and outdoor). As the court stated in its May 10, 2001 Decision and Order at page 16:

> An official is personally involved if: a) he or she participates directly in the constitutional deprivation; b) acts or fails to act with reckless disregard of the plaintiff's constitutional rights; or c) the conduct that deprived the plaintiff of his constitutional rights occurred at the official's direction or with his or her knowledge and

consent. [Rascon v. Hardiman, 803 F.2d 269, 273 (7th Cir. 1986)]; Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982).

The plaintiff has alleged that Mr. Hatumaki directly participated in denying him outdoor and indoor exercise. The plaintiff has also alleged that Mr. McCaughtry was aware that Mr. Hautamaki denied the plaintiff indoor and outdoor exercise. Contrary to the defendants' assertion, alleging awareness of the alleged constitutional violation is enough to allege personal involvement. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (concluding the plaintiff sufficiently alleged the personal involvement of the defendant by alleging that he knew of the alleged constitutional violation and "turned a blind eye to it"). The plaintiff's allegations are enough to allege the personal involvement of defendants Mr. Hautamaki and Mr. McCaughtry. Accordingly, on reconsideration, the plaintiff may proceed on his claim that Mr. Hautamaki denied him indoor and outdoor exercise for six months and that Mr. McCaughtry was aware of this denial.

NOW, THEREFORE, IT IS ORDERED that the plaintiff's motion for reconsideration is **granted.**

IT IS FURTHER ORDERED that the defendant's motion for reconsideration is **denied.**

IT IS FURTHER ORDERED that the plaintiff may proceed on his Eighth Amendment claim against Mr. Hautamaki and Mr. McCaughtry that he was denied exercise for six months.

IT IS FURTHER ORDERED that the court's order of May 10, 2001, is vacated, in part, as it pertains to the plaintiff's Eighth Amendment claim against Mr. Hautamaki and Mr.

McCaughtry. They are reinstated as defendants in this action and should file an answer to plaintiff's claim within 10 days of receipt of this order. The Court's scheduling order of May 10, 2001, shall apply equally to defendants Hautamaki and McCaughtry.

Dated at Milwaukee, Wisconsin, this 19th day of June, 2001.

/s/ Aaron E. Goodstein
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RODOSVALDO POZO,

Plaintiff,

v. Case No. 99-C-1464

GARY MCCAUGHTRY, CAPTAIN MURASKI, CAPTAIN COKE, SERGEANT GERRITSON, LIEUTENANT MICHAEL L. HOWARD, and LIEUTENANT HAUTAMAKI,

Defendants.

DECISION AND ORDER CERTIFYING INTERLOCUTORY ORDER FOR APPEAL AND STAYING PROCEEDINGS

The plaintiff, Rodosvaldo Pozo, a prisoner at Green Bay Correctional Institution, filed this pro se civil rights action under 42 U.S.C. § 1983. On May 10, 2001, the court issued a Decision and Order in this case. On June 19, 2001, the court issued a Decision and Order on the defendant's and the plaintiff's motions to reconsider the court's May 10, 2001 Decision and Order.

The defendants filed a motion pursuant to 28 U.S.C. § 1292(b) for certification of the court's May 10, 2001 Decision and Order. In their motion, the defendants ask the court to

amend the May 10, 2001 Decision and Order to certify it for appeal under § 1292(b).

Section 1292(b) requires that the order sought to be appealed "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Accordingly, there are four statutory criteria to guide the district court's decision: there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation. Ahrenholz v. Board of Trustees of the University of Illinois, 219 F.3d 674, 675 (7th Cir. 2000). The criteria are conjunctive, not disjunctive. Id. at 676.

A "question of law" references "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." Id. A "question of law" is "something the court of appeals [can] decide quickly and cleanly without having to study the record." Id. at 677.

In this case, a question of law is involved. The defendants assert that the plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997(e) because he untimely filed his administrative appeals as required by state law. Section 1997(e) provides that

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Thus, the question of law presented by this case is whether a plaintiff exhausts his administrative remedies as required by

§ 1997(e) if he "exhausts" the available administrative process, but does so in a manner that precludes him from receiving a decision on the merits of his claim. Moreover, the question of law is controlling. If the defendants are right, then the plaintiff's case must be dismissed. See Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) ("a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed").

Furthermore, although the court believes that its decision is consistent with the United States Supreme Court's interpretation of "exhaustion" (as discussed in the court's June 19, 2001 decision denying defendant's motion for reconsideration), the Seventh Circuit has not directly addressed this issue. Moreover, this court's research did not reveal any cases from the other circuit courts that directly addressed this issue. (Contrary to the defendants' assertion, the dicta cited by them from the Sixth Circuit does not directly address the issue.) However, it is plausible that another court would decide the issue differently. Accordingly, the issue is contestable.

Finally, the resolution of this issue, if decided in the defendants' favor, will speed up the litigation. In fact, the litigation will come to an end. See Perez, 182 F.3d at 535.

Thus, the court finds that the defendants' motion for certification of the court's May 10, 2001 Decision and Order satisfies the four statutory criteria. However, the court must still determine whether the defendants timely filed their motion for certification. Appeals taken pursuant to § 1292(b) must be taken within ten days after the entry of the order appealed from. Federal Rules of Appellate Procedure 5(a)(3), provides;

> If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from the entry of the amended order.

The Seventh Circuit discussed the interplay between § 1292(b) and Rule 5(a):

> Although the district judge has by virtue of Rule 5(a) the power to amend his interlocutory ruling at any time, it does not follow that the power was properly exercised in this case. The grant of a power is not a license to abuse it. The ten-day limitation in section 1292(b) is not to be nullified by promiscuous grants of motions to amend. An amendment that will have the effect of extending the limitation is proper only if there is a reason for the delay, as there would be for example if developments since the interlocutory order had been entered demonstrated, as had been unclear earlier, that the order resolved a controlling question of law about which there was substantial ground for a difference of opinion.

Weir v. Propst, 915 F.2d 283, 287 (7th Cir. 1990). In Weir, the court denied a request for leave to appeal when a little more than two months had passed between the district court's denial of a motion to dismiss and the defendants' motion to certify the order pursuant to 1292(b). Id. at 285; see also Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc., 202 F.3d 957 (7th Cir. 2000) (two month delay without excuse "was sufficient grounds for [the court of appeals] to refuse [its] permission to appeal"). In Nuclear Engineering Co. v. Scott,

660 F.2d 241, 245-28 (7th Cir. 1981), the Seventh Circuit "allowed the district judge, first by certifying a previously issued order and then by reentering the certified order, to open up a gap of slightly more than a month between the entry of the order and the certification that started the appellant's ten-day clock running." Weir, 915 F.2d at 286.

In this case, about a month and a half elapsed between the denial of the defendants' motion to dismiss and their motion to certify the order pursuant to § 1292(b). In between, a motion to reconsider was filed by the remaining defendant, defendant Gerritson. However, "the time limits in section 1292(b) may not be circumvented by the facile device of asking for reconsideration of the order sought to be appealed under that section." Id. at 286.

The May 10, 2001 Decision and Order dismissed the plaintiff's case as against defendants Hautamaki and McCaughtry. Thus, they had no reason to seek certification of the order prior to the entry of the June 19, 2001 Decision and Order reinstating them. Accordingly, defendants Hautamaki and McCaughtry's motion to certify the order pursuant to § 1292(b) filed ten days after the decision reinstating them was timely. Therefore, the court will grant their motion to certify the May 10, 2001 Decision and Order. Defendant Gerritson has offered no reason for his delay in filing his motion to certify the order. Nevertheless, the court's decision to grant defendants Hautamaki and McCaughtry's motion to certify the May 10, 2001 Decision and Order will affect defendant Gerritson as well.

NOW, THEREFORE, IT IS ORDERED that defendants Hautamaki and McCaughtry's motion for certification of an

interlocutory order for appeal of the court's May 10, 2001 Decision and Order is granted.

IT IS FURTHER ORDERED that all district court proceedings in this case are hereby stayed pending resolution of the exhaustion issue by the Court of Appeals.

IT IS FURTHER ORDERED that the court's May 10, 2001 Decision and Order be and hereby is amended to include the following:

This order denying the defendants' motion to dismiss as it relates to the defendants' argument that the plaintiff failed to exhaust his administrative remedies involves "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Dated at Milwaukee, Wisconsin, this 12th day of July, 2001.

/s/ Aaron E. Goodstein
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX E

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 23, 2001

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

IN RE: GARY R. MCCAUGHTRY, Warden, RANDALL GERRITSON and DAVID HAUTAMAKI, Petitioners.	] Appeal from the] United States] District Court] for the Eastern] District of] Wisconsin.]] Aaron E. Goodstein,] Magistrate Judge.
No. 01-8023	]]

The following are before the court:

1. **PETITION FOR PERMISSION TO APPEAL,** filed on July 20, 2001, by counsel for petitioners.

2. **PETITION OPPOSING DEFENDANTS' PETITION FOR PERMISSION TO APPEAL,** filed on July 30, 2001, by the pro se respondent.

IT IS ORDERED that the petition for permission to appeal is **GRANTED**. Petitioners shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order, pursuant to Federal Rule of Appellate Procedure 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

IT IS FURTHER ORDERED that counsel is appointed to represent the pro se respondent. Counsel will be appointed and a briefing schedule set pursuant to separate court order. Among whatever other issues they may wish to raise, the parties are directed to brief the issue of whether exhaustion under 42 U.S.C. § 1997e(a) is treated the same as the exhaustion principles addressed in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 13, 2002

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ANN CLAIRE WILLIAMS, Circuit Judge

RODOSVALDO POZO, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 01-3623 **v.**	)	
GARY MCCAUGHTRY, RANDALL GERRITSON and DAVID HAUTAMAKE, *Party.*	)	No. 99-C-1464 Aaron E. Goodstein, *Judge.*

Order

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on May 1, 2002. No judge in regular en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.